IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 140.

FEDERAL BROADCASTING SYSTEM, INC.

v.

AMERICAN BROADCASTING CO., INC. and
MUTUAL BROADCASTING SYSTEM

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

This proceeding is a petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case on April 8, 1948 (R. 171). The opinion of the Circuit Court of Appeals (R. 167-171) is reported in 167 F. (2d) 349 (1948). That Court affirmed an order, entered on November 12, 1947, by the United States District Court for the Southern District of New York, denying Petitioner's motion for a preliminary injunction (R. 149).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code.

Question Presented.

The sole question is whether the Circuit Court erred in its conclusion, "we have no reason to suppose [the District Judge] abused his discretion in the present case" and in thereby affirming the order denying petitioner's motion for preliminary injunction.

Statutes Involved.

The statutes involved are the Sherman Act, 15 U.S.C. §§ 1, 2; the Clayton Act, 15 U.S.C. § 26; and the Federal Communications Act, 47 U.S.C. § 313.

Statement.

This is an interlocutory proceeding in an action for treble damages and for a preliminary and permanent injunction based upon an alleged conspiracy to violate the Sherman Act. Petitioner, licensee of radio station WSAY in Rochester, New York, alleged that the four national networks[1] were engaged in an illegal conspiracy to exclude radio stations from the national advertising market except at prices dictated by them (R. 18-19). The Petitioner further alleged that because it would not submit to such dictation, the networks, in pursuance of the asserted conspiracy, agreed to boycott Station WSAY (R. 19-20). Treble damages and permanent injunctive relief were prayed against all four networks and a preliminary injunction to restrain the alleged boycott was asked against the

[1] These are the National Broadcasting Company ("NBC"); Columbia Broadcasting System, Inc. ("CBS"); Mutual Broadcasting System ("Mutual"); and American Broadcasting Co., Inc. ("ABC"). Only the latter two are Respondents here.

two Respondents here (R. 22-23). The only matter so far adjudicated is the prayer for a preliminary injunction in support of which Petitioner submitted ex parte affidavits and annexed documents (R. 30-59; Exs. 1-37). The Respondents filed counter affidavits and incorporated documents which specifically denied the allegations of conspiracy (R. 59-149, 65-66, 74-78, 90, 94-98).

The relevant facts shown by the record, and in areas of dispute determined by the court below (R. 167-171), are as follows:

Prior to the events involved in this proceeding there were three radio stations in Rochester, of which two were regularly affiliated with networks NBC and CBS (R. 91). The third station, Petitioner's WSAY, was regularly affiliated with Respondent Mutual until January, 1943 (R. 70). Thereafter, WSAY declined offers of affiliation from both Respondents ABC and Mutual (R. 42, 43, 72, 91, 92), instead doing business upon its own terms with both ABC and Mutual on a non-affiliated basis (R. 72, 73, 80, 81, 93 and Ex. 19). Until 1947, Petitioner dictated terms which Respondents considered exorbitant, which it was able to do because of Station WSAY's monopolistic position as the only unaffiliated outlet for these networks in Rochester (R. 67-68, 71-73, 78, 82-84 and 115). In April and May 1947, the Federal Communications Commission, pursuant to applications filed in December 1943 and May 1946 (R. 94, 163), licensed two new stations, WARC and WVET, in Rochester (R. 92). Subsequently, on May 23, 1947, Respondent ABC signed an affiliation contract with WARC. In July 1947, Respondent affiliated with WVET (R. 74-76, 92 and Ex. 27). Thereafter, each separately exercised its privilege of terminating the use of WSAY and notified Petitioner (R. 78, 96, 169, 170; Exs. 19, 28, 29, 30).

The trial court permitted WVET to intervene and denied the request for a preliminary injunction with a memorandum opinion (R. 149-150). The Circuit Court of Appeals concluded that the essential issue in the case was whether

the Respondents had "really acted individually and not jointly" (R. 169). After analyzing the facts relevant to that question, the court below affirmed the denial of the preliminary injunction, concluding that "In the record now before us there is no persuasive evidence of a conspiracy to boycott or otherwise unlawfully exclude the plaintiff from obtaining defendants' programs, whatever may later be established at a trial." (R. 169).

ARGUMENT.

I. The Decision Below Does Not Call for Review by this Court.

The petition misconceives the holding of the Court below. What it ruled on was the following prayer for preliminary injunction in Paragraph IX(c) of the Complaint (R. 22):

> "(b) That, on behalf of plaintiff Federal Broadcasting System, Inc., a temporary restraining order issue forthwith and a preliminary injunction issue immediately thereafter enjoining the carrying out of the agreement and conspiracy entered into by defendants ABC and Mutual for the withdrawal of ABC and Mutual programs from Station WSAY pursuant to the unlawful conspiracy to boycott Station WSAY;"

The issue thereby presented was one of fact whether Respondents ABC and Mutual concertedly boycotted Petitioner's station. As has been noted, the court below held that no finding of concert was warranted on this record and affirmed the trial court's denial of interlocutory relief.

In the present posture of the case, the decision below does not support review here, whatever the ultimate merits of the complaint. The rule is well established that the grant or denial of a preliminary injunction is within the sound discretion of the trial court. *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141; *Rice & Adams Corp.* v. *Lathrop*, 278 U. S. 509, 514. This Court has often denied certiorari at an intermediate stage in cases where, after trial on the

merits, it has later granted the writ and reversed the original position of the trial court. See cases collected at Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, 623, 628. The Court has been guided, among other thing, by recognition of "the proven insufficiencies" of a "procedure based on affidavits and interrogatories" as a means of determining serious issues of fact. (*Eccles* v. *Peoples Bank*, 333 U. S. 426, 434.)

In the circumstances at bar the decision below was a clearly appropriate exercise of the Court's discretion. Petitioner's sole reliance was upon evidence "not subject to probing by judge and opposing counsel" (*Eccles* v. *People's Bank, supra*, 333 U. S. at 434), and Respondents' affidavits were contradictory on the vital issue of concerted action. The denial of interim relief was therefore wholly proper; indeed it was required. See, e.g., *Warner Bros. Pictures* v. *Gittone*, 110 F. (2d) 292, 293 (C. C. A. 3, 1940); *Behre* v. *Anchor Ins. Co.*, 297 Fed. 986, 991 (C. C. A. 2, 1924); *Stanley Co.* v. *Lagomarsino*, 49 F. (2d) 702, 703 (C. C. A. 2, 1931); *Murray Hill Restaurant* v. *Thirteen Twenty One Locust*, 98 F. (2d) 578, 579 (C. C. A. 3, 1938). Moreover, disputable questions of law are also involved in this case (R. 170) which must be resolved before Petitioner can finally prevail. See, e. g., *Lowe* v. *Consol, Edison*, 67 F. Supp. 287, 289 (S. D. N. Y., 1941); *Hand* v. *Mo.-Kan. Pipe Line Co.*, 54 F. Supp. 649, 651 (Del., 1944).

It follows, as the court below held (R. 167), that the denial of interlocutory relief was no abuse of the trial court's discretion.

II. The Court Below Properly Ruled that in the Absence of Concerted Action No Violation of the Antitrust Laws Was Shown.

The lower court was right in holding that since they acted individually, Respondents' conduct was entirely "within their rights" (R. 169). For without the vital element of

concert, as to which the issue was resolved against Petitioner,[2] its charges have no substance.

1. *The price-fixing charge:* Petitioner's contention that the lower court upheld illegal price fixing of WSAY's rates to national advertisers is without foundation. As the lower court perceived, broadcast time for a network program is not bought by a national advertiser from individual stations. It is bought from networks—as part of an "aggregate" of which there are other components besides the time of the individual station (R. 169). For example, among these are the networks' own facilities, including nationwide wire lines which connect the individual stations into a network, artistic and technical services, and simultaneous time which the network has purchased over many other stations. (See FCC Chain Broadcasting Report, 1941, pp. 3-4, 41, 77; Exs. 20, 21).

What petitioner calls price-fixing is the expression by the network of its opinion of what the time of the individual station is worth in terms of the possibility of resale to network customers and the operation and welfare of the network as a whole (R. 61-62, 73, 82-84, 99). Petitioner's chief affiant recognizes that the network "undertakes to sell the facilities of my station to advertisers",[3] but Petitioner

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[2] It is axiomatic that the resolution below of contradictory evidence or inferences will not be disturbed on appeal. *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 41; *Gary Theatre Company* v. *Columbia Pictures Corporation*, 120 F. (2d) 891, 894-5 (C. C. A. 7, 1941).

[3] R. 38. The superficially conflicting passage quoted from the FCC's Chain Broadcasting Report (Pet. p. 6) is out of context. What the quotation referred to was the sale to the national advertiser of spot broadcast time, not network broadcast time. (Report pp. 73-75). It is also sharply apparent from the following rule which the FCC "accordingly adopted" (*National Broadcasting Co.* v. *United States*, 319 U. S. 190, 209):

> "No license shall be granted to a standard broadcast station having any contract, arrangement or understanding, expressed or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time *for other than the network's programs.*" (Emphasis supplied.)

urges the proposition that under the antitrust laws, it alone is entitled to decide for the networks what prices they shall charge their own customers (R. 38). The novelty of this proposition is enhanced by the facts that Petitioner's facilities are but a single constituent of the product sold by the networks and the market for it is one which the networks have created.

The implications of oppression of WSAY by Respondents are no less curious. There is no suggestion that Respondents discriminated against Petitioner by offering it less favorable terms than other comparable facilities brought. Nor was there any incentive for the networks to depreciate the prices for WSAY. By the contract which each Respondent repeatedly offered Petitioner (Exs. 20-21, R. 42-43, 72, 91-92), the more the network could charge its customers for WSAY, the greater would be the network's profit. Petitioner's real objection therefore must be that Respondents refused to buy its product at higher prices than the market would bear (R. 61, 67, 72, 81-84, 98-99, 123).

2. *The charge of exclusion:* There was no ruling by the lower court, either express or implied as claimed by Petitioner, that the networks have the "right to exclude unaffiliated stations from all access to the national advertising market". In fact, the asserted exclusion from "all access to the national advertising market" is imaginary. Petitioner is completely free to offer its facilities and programs to national advertisers (R. 98). What it is unable to do, as a non-affiliate, is to supply the demand for network service, produced by someone else with whom it was unable to arrive at a bargain. Petitioner's actual complaint is simply that because the affiliation terms it demanded were unacceptable, other affiliates were chosen by Respondents to carry their programs in Rochester. There was nothing unlawful about that. As the opinion below recites (R. 169):

> "A network is not a common carrier and each therefore had the right in the absence of concerted action

to make such contracts for the distribution of its programs as it chose."

The lower court was clearly right. So long as the choice is individually made, the right of a trader to select those with whom he will deal is left unimpaired by the Sherman Act. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565, 572-3; *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Co.*, 227 Fed. 46, 48-49 (CCA 2d, 1915); *Brosious* v. *Pepsi-Cola Co.*, 155 F. (2d) 99, 101-2 (CCA 3d, 1945); *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53, 61-62 (CCA 8th, 1941). No different rule applies in the broadcasting field. See *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. (2d) 597, 600 *et seq.*, (CCA 3rd, 1945). The principle is reinforced by the specific declaration in the Communications Act of 1934, that "a person engaged in radio broadcasting shall not be deemed a common carrier." (48 Stat. 1065, 47 U.S.C. § 153). Moreover, it is backed by particularly cogent considerations of public policy in the case of the networks. For in view of the inherently limited number of broadcasting facilities, any requirement that the networks extend their wire lines to all comers would inevitably lead to "wasteful duplication of service" (FCC Chain Broadcasting Report, 1941, p. 58). This doubtless prompted the FCC's express recognition of a network's right to grant "first call" on its programs to affiliates (R. 111).[4]

The truth is that Petitioner's lack of an affiliation, and any consequent financial injury, is the result not of any

[4] The fact is, moreover, that on this record there is no ground for the allegation that the networks have in fact "excluded" unaffiliated stations from network programs. Before acquiring their own regular affiliates, both Respondents employed WSAY'S facilities on a non-affiliated basis. (Ex. 19, pp. 1-3; R. 80, 93). Petitioner's own affidavits reveal instances in which WSAY was retained by NBC and CBS to carry programs rejected by their regular affiliates. (R. 34-36). What Respondents will do in the future with programs rejected by their newly affiliated stations in Rochester is in the realm of speculation on this record.

illegal exclusionary conduct by Respondents, but of the FCC's action in licensing two more stations in Rochester. These raised the total number in the city to five—one more than there were national networks. Petitioner was thereby put in the unwelcome position of having to compete for the business of Respondents' networks. It lost out for the simple reason that it priced WSAY out of the market for the time being.[5]

3. *The asserted misconstruction of the Chain Broadcasting Regulations:* There is no merit in Petitioner's third specification of error to the effect that the lower court erroneously held that the Chain Broadcasting Regulations permit "price-fixing and exclusive practices of the national chain networks". This specification is meaningful only on the premise that illegal price-fixing or exclusionary conduct had been proved. But as has been shown, that would require proof of concert, on which the issue was resolved against Petitioner. The necessary result was that the court properly rejected the price-fixing charges since all that remained was a claim that the individual networks were entitled to no voice in the prices for the "aggregate" product they were selling to their own customers (R. 169). With specific reference to "exclusion", all that the court held was that, on the record at hand, it was too doubtful of the merits of Petitioner's charges to order the drastic relief prayed (R. 170). That these doubts were well founded is evident from the preceding discussion.

The petition does not support its unwarranted implication that Respondents violated the Chain Broadcasting

[5] Under Rule 3.103 of the Chain Broadcasting Regulations, affiliation contracts are limited to a maximum duration of two years. (R. 112.) There is no factual support for the conclusionary statement in Petitioner's affidavits that net work affiliations "almost always continue on . . . a permanent basis" (R. 46). This regulation in fact inhances the competitive opportunities which Petitioner could claim under the antitrust laws by guaranteeing that affiliations with each network will be on the market not less than once every two years.

Regulations. There is no citation of any offending provisions of the affiliation contracts used by Respondent (Exs. 20 and 21), for the simple reason that there are none. Nor is there any showing of conduct inconsistent with those Regulations.[6]

4. *The conspiracy alleged to arise from similarity of conduct:* By Petitioner's last specification of error, the lower court is charged with an improper refusal to recognize a "prima facie conspiracy" allegedly arising from a uniform system of business "completely" excluding unaffiliated stations from the national advertising market (Pet. pp. 5, 9). This specification is another unsubstantial effort to challenge the court's determination of fact that there was no sufficient showing of concerted exclusion to support the relief sought (R. 170).

The proof relied upon to show the alleged common participation of the four networks in an improperly "uniform course of dealing" is nothing more than the use of a business method which Petitioner admits "is infinitely more convenient to the networks" than the one Petitioner would prefer them to follow (R. 38-39). In other words, the argument presupposes the unique proposition that the antitrust laws preclude the adoption of a superior commercial practice if it is in prior use by competitive enterprises. Much more than such similarity of business practice as petitioner relies upon here is essential to establish even a prima facie case of a violation of the Sherman Act. Compare *Interstate Circuit Inc.* v. *United States,* 306 U.S. 208; *American Tobacco Co.* v. *United States,* 147 F. (2d) 93 (CCA 6th, 1944), affirmed 328 U.S. 781.

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[6] The quotation from page 59 of the Chain Broadcasting Regulations (Pt. p. 7) is also out of context. The full text is plain that the FCC left to negotiations between the interested parties the determination of the extent to which programs rejected by affiliates would be broadcast elsewhere. Affiliates were simply prohibited from precluding such negotiations, and Respondents' affiliation contracts do not prevent such negotiations. (Exs. 20 and 21.)

Moreover, the argument incorrectly assumes that there was any improper exclusion of Petitioner or anyone else. The facts are precisely opposite. They show with respect to WSAY that Respondents here were not only willing, but consistently endeavored, to do business with Petitioner on a non-discriminatory basis, only to be met by Petitioner's insistence on preferential treatment.[7] They were not thereby prohibited from contracting with other affiliates when they became available. Nor were they thereafter under any obligation to do business with Petitioner. For, as has been previously established, not only are the networks entitled to the right of the private trader to determine with whom he will deal and when, but considerations of public policy, as reflected both in the FCC's expressions and regulations, support the practice of the networks to maintain only one regular affiliate in any given locality (See pp. 7-8, *supra*).

CONCLUSION.

Petitioner's basic thesis is that in buying broadcast time the networks must, as a matter of law, submit to the dictates of the sellers as to the price to be paid for such time. This would preclude any possibility of the operation of a network as a cohesive unit by committing the determination of vital matters of business judgment and policy to hundreds of widely separated individuals concerned primarily with the welfare of their isolated enterprises. An end would thus be put to the networks as independent going concerns. There is no precedent in antitrust law which supports Petitioner's theory. Even when so dominant a position has been achieved that all comers must be served, the obligation is only to serve all alike, not to serve them on their own terms.

For the foregoing reasons, the petition not only requires denial because of the nature of the order in question and

[7] This alone distinguishes the *Goldman* and *Bigelow* cases cited at page 9 of the petition.

the record on which it was issued, but also because there is no showing either of a conflict among circuits or of any question of federal law calling for settlement by this court.

Respectfully submitted,

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